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## CHARACTERISTICS OF CHANGING A COMPLAINT OFFENSE INTO A REGULAR OFFENSE IN THE CRIMINAL ACT OF MARITAL RAPE

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### Abstract

*This study examines the urgency of changing the complaint-based offense into a regular offense in rape crime within marriage as regulated in Article 473 paragraph (6) of the National Criminal Code. Although Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence (UU TPKS) views sexual violence as a serious issue, there is legal disharmony because the National Criminal Code and Article 52 of Law Number 23 of 2004 concerning the Elimination of Domestic Violence (UU PKDRT) still categorizes rape by a husband against his wife as a complaint-based offense. Using normative legal research methods with a statutory and legal conceptual approach, this study analyzes the philosophical, sociological, and juridical foundations of these regulations. Sociologically, economic dependence, social pressure, and patriarchal culture often hinder victims from reporting. Philosophically, the state has a constitutional responsibility to protect the human rights and sense of security of every citizen without exception. The study concludes that the definition of "violence" in Articles 89 and 90 of the Criminal Code, such as unconsciousness or serious injury, should be the basis for changing the status of a case to an ordinary crime. The author recommends that law enforcement officials process reports from third parties based on Article 108 of the Criminal Procedure Code to ensure justice for victims and eliminate impunity for perpetrators in the domestic sphere.*

**Keywords:** complaint offense, sexual violence crime, marital bond.

### Abstrak

Penelitian ini mengkaji urgensi perubahan delik aduan menjadi delik biasa dalam tindak pidana perkosaan di dalam ikatan perkawinan sebagaimana diatur dalam Pasal 473 ayat (6) KUHP Nasional. Meskipun Undang-Undang Nomor 12 Tahun 2022 tentang Tindak Pidana Kekerasan Seksual (UU TPKS) memandang kekerasan seksual sebagai isu serius, terdapat ketidakharmonisan hukum karena di dalam KUHP Nasional dan Pasal 52 Undang-Undang Nomor 23 Tahun 2004 tentang Penghapusan Kekerasan Dalam Rumah Tangga (UU PKDRT) tetap mengategorikan perkosaan suami terhadap istri sebagai delik aduan. Masalah utama muncul ketika korban mengalami luka berat atau pingsan, namun negara tidak dapat memproses hukum tanpa pengaduan langsung dari korban. Menggunakan metode penelitian hukum normatif dengan pendekatan perundang-undangan dan konsep hukum, penelitian ini menganalisis landasan filosofis, sosiologis, dan yuridis terkait aturan tersebut. Secara sosiologis, ketergantungan ekonomi, tekanan sosial, dan budaya patriarki sering kali menghalangi korban untuk melapor. Secara filosofis, negara memiliki tanggung jawab konstitusional untuk melindungi hak asasi dan rasa aman setiap warga negara tanpa kecuali. Hasil penelitian menyimpulkan bahwa batasan "kekerasan" dalam Pasal 89 dan 90 KUHP,



seperti kondisi pingsan atau luka berat, seharusnya menjadi dasar untuk mengubah status perkara menjadi delik biasa. Penulis merekomendasikan agar aparat penegak hukum dapat memproses laporan dari pihak ketiga berdasarkan Pasal 108 KUHP guna menjamin keadilan bagi korban dan menghapuskan impunitas pelaku dalam ranah domestik.

**Kata kunci:** delik aduan, tindak pidana kekerasan seksual, ikatan perkawinan.

## **I. INTRODUCTION**

Based on Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence (TPKS Law), the state lists several types of acts that constitute the crime of sexual violence, as regulated in Article 4 paragraphs (1) and (2) of the TPKS Law, one of which is rape. According to Sofwan Dahlan, rape is an act of sexual intercourse or sexual intercourse, generally committed with a woman, by means of force, creating fear, or deception. Regarding the scope of the occurrence itself, Article 6 of the TPKS Law states, "...any sexual violence committed either within or outside of marriage...", so it can be understood that the state specifically states that the crime in question (in this case, rape) can occur both within and outside of marriage.

When discussing criminal acts, it cannot be separated from the offense used. In general, criminal acts recognize two offenses: a complaint offense and a common offense. The definition of a complaint offense according to Drs. P.A.F. Lamintang is an act involving a violation of personal rights that is known or experienced only by the victim and therefore can only be prosecuted upon a complaint from the injured party. Meanwhile, according to Moeljatno, an ordinary crime is an act expressly prohibited by law and carries with it specific criminal penalties for violators. The distinction between these two crimes is that, when we examine Article 6 of the TPKS Law and the TPKS Law as a whole, the law does not specify that rape occurring within a marriage constitutes a "complaint-based offense." Therefore, it can be understood that this act of sexual violence constitutes an ordinary crime, meaning investigators have the right to process the case without waiting for a report from the victim.

However, Law Number 23 of 2004 concerning the Elimination of Domestic Violence (PKDRT Law), specifically Article 52, states that sexual violence committed by a husband against his wife constitutes a complaint-based offense. This was then reinforced by the enactment of Law Number 1 of 2023 concerning the Criminal Code (National Criminal Code), which subsequently sparked controversy. Article 473 paragraph (6) of the National Criminal Code essentially states that the crime of rape committed within the bonds of

marriage cannot be prosecuted except upon complaint by the victim. Of course, the wording of Article 52 of the Domestic Violence Law and Article 473 paragraph (6) of the National Criminal Code is very much in contrast to Article 6 of the TPKS Law. This inconsistency between one law and another then raises serious issues, especially regarding sexual violence in the form of rape.

As we know, some people still consider sexual violence, particularly marital rape, a taboo. Nils Christie gave the example of a husband committing violence against his wife, who then reports it to the police. The case is called "husbråk," which translates to "a domestic dispute." Nils explained that in husbråk, the wife's status as the victim of violence was "unrecognized," as domestic violence was considered a minor issue and could be resolved amicably, without going through the courts. Furthermore, Nils expressed his opinion that many people still believe that a person can only be considered "ideal" to be a victim if they are seen as pure, weak, flawless, and have no role in the crime. Consequently, society's perspective often assumes that victims who do not meet these criteria often have a harder time receiving sympathy and justice, and they even tend to be blamed for the crime they experienced (victim blaming). After much debate regarding the "complaint offense" in the crime of rape that occurs within the bonds of marriage, another problem arose in the ambiguity of Article 473 paragraph (6) of the National Criminal Code and Article 52 of the Domestic Violence Law which do not explain how the limits of the "violence" referred to. In both articles, the law does not explain when law enforcement officers can take action against the crime of rape that occurs within the bonds of marriage. For example, if the victim (who is generally the wife) has suffered serious injuries as a result of the crime of rape that she experienced, will the state still use the principle of the complaint offense and not process the report filed by another party (other than the victim)?

## **II. RESEARCH METHODS**

This research is a legal research that uses the normative legal research type. According to Peter Mahmud Marzuki, normative legal research is a process to discover legal rules, legal principles, and legal doctrines to answer the legal issues faced. The legal materials used in this research are primary, secondary, and tertiary legal materials. The primary legal materials consist of laws, while the secondary and tertiary legal materials used are legal journals, legal expert opinions, legal cases, court decisions, legal dictionaries, and legal encyclopedias. The

approach methods used in this research are the Statute Approach and the Legal Concept Analysis Approach (The Conceptual Approach). According to Peter Mahmud Marzuki, the statutory approach is an approach carried out by examining all laws and regulations related to the legal issue being handled. Meanwhile, the Legal Concept Analysis Approach focuses on the analysis and understanding of legal concepts relevant to the problem being studied.

### **III. RESEARCH RESULTS**

Domestic Violence (DV) is a crime whose enforcement remains difficult, as many victims are reluctant to report the crime. Based on data collected by the National Commission on Violence Against Women (KOMNAS Perempuan), several contributing factors include many victims feeling ashamed, receiving threats from the perpetrator, or a lack of support from their surrounding environment. Therefore, indirectly, it can be said that one of the factors preventing this crime from coming to the surface is the use of complaint-based offenses. This means that because the crime occurs in the private sphere (within a household relationship), law enforcement cannot simply intervene and prosecute the perpetrator. However, because of this, in certain cases, victims of domestic violence still have difficulty obtaining their rights. Therefore, it is important for the government to review whether Article 473 paragraph (6) of the National Criminal Code is still effective for use, given the difficulty of implementing this article in real life.

According to Article 156 of the Criminal Code, violence is defined as "any act with or without the use of physical force that causes harm to the body or life, results in physical, sexual, or psychological suffering, and deprives a person of liberty, including rendering a person unconscious or helpless." Furthermore, David Riches defines violence as an act that causes physical injury, which is considered "true" by the perpetrator directly, and considered "false" by several witnesses. When talking about "violence," some people may associate such acts with "abuse." Indonesia itself has several articles that regulate abuse, namely in Articles 351-358 of the Criminal Code. Hilman Hadikusuma gave his opinion on the definition of abuse as an arbitrary act by carrying out torture, oppression, and so on against the abused party. Furthermore, according to criminal law doctrine, abuse is also defined as an act carried out intentionally by a person to cause pain or injury to another person. Based on this doctrine, abuse has the following elements:

1. Intention;
2. An act; and
3. The presence of a consequence (intended), namely:
  - a. Pain to the body; or
  - b. Injury to the body.

Furthermore, Article 89 of the Criminal Code states that "violence" can be equated with causing someone to faint or become helpless. Based on the wording of Article 89 of the Criminal Code, if an action committed by someone causes another person to faint or become helpless, then that can be considered violence. Furthermore, Article 90 of the Criminal Code also explains that serious injury can include several types, such as loss of one of the five senses, severe disability, paralysis, and so on. When linked to Article 473 paragraph (6) of the National Criminal Code, the main topic of this research, even though the victim, generally a wife, was raped using "violence" or "threats of violence" to the point of becoming helpless and unconscious, the husband as the perpetrator cannot be prosecuted unless the victim reports it to the authorities. Based on this description, some people, including the author, may believe that the state cannot protect the rights of rape victims within the household. Even when the victim is helpless and unconscious, the state cannot "intervene" unless the victim files a complaint.

In the Domestic Violence Law, not all acts of violence are considered ordinary crimes. Some criminal acts are classified as complaint-based crimes, for example, in Article 44 (4) and Article 51 of the Domestic Violence Law:

Article 44 of the Domestic Violence Law

(4) "If the act referred to in paragraph (1) is committed by a husband against his wife or vice versa, which does not result in illness or an obstacle to carrying out his official duties, livelihood, or daily activities, the perpetrator shall be punished with a maximum imprisonment of 4 (four) months or a maximum fine of Rp 5,000,000.00 (five million rupiah)."

Article 51 of the Domestic Violence Law:

"The crime of physical violence as referred to in Article 44 paragraph (4) is a complaint-based offense."

If we simply look at the example above, we can clearly understand that if the physical violence in question causes the victim to become ill, suffer serious injury, or even die, then the act is considered an ordinary crime. However, if the violence in question does not cause illness or prevent the victim from carrying out daily activities, then the act is considered a complaint-based offense. Based on these characteristics, it can be understood that, in short, an ordinary crime is a crime whose consequences are very detrimental to the victim (including illness, serious injury, and death), while the consequences of a complaint-based offense do not "enough" to prevent the victim from carrying out their daily activities.

To understand the difference between complaint-based offenses and ordinary crimes in terms of complaints or reporting, we can use Law Number 8 of 1981 concerning Criminal Procedure (KUHAP) as a guide. Article 1 Number 24 of the Criminal Procedure Code (KUHAP) defines a report as a notification submitted by a person, pursuant to a statutory right or obligation, to an authorized official that a criminal event has occurred, is occurring, or is suspected of occurring. Meanwhile, Article 1 Number 25 of the Criminal Procedure Code defines a complaint as a notification accompanied by a request from an interested party to an authorized official to take legal action against a person who has committed a criminal offense that is detrimental to them. There is no fundamental difference between these two definitions, formally speaking, as the only difference lies in the substantive law or the type of crime reported. A "report" is a more general notification, encompassing almost all types of crimes. A "complaint," on the other hand, is a notification made upon the occurrence of a criminal offense, which is detrimental to the victim or complainant. So, is there a difference between withdrawing a report and a complaint under the law?

The Criminal Code (KUHAP) stipulates provisions for withdrawing a complaint previously filed by a victim of a crime. This is regulated in Article 75 of the Criminal Code, which states, "A person who files a complaint has the right to withdraw it within three months of filing it." Victims withdraw their complaints can be caused by several factors, but the primary factor is generally the parties' desire for restorative justice. Restorative justice is a criminal case resolution that involves the perpetrator, victim, the perpetrator/victim's family, and other related parties working together to find a just solution that emphasizes restoration to the original state, rather than retaliation in the form of criminal punishment.

Regarding "reports," the law does not specifically regulate the time limit or procedures for withdrawing a report. This is because in ordinary crimes, the case is entirely handled by the state, whereas in criminal cases, the prosecution is carried out by the public prosecutor (unlike in civil cases, where the plaintiff or injured party files the lawsuit). Therefore, the termination of the investigation process in ordinary criminal acts can only be caused by three elements, as regulated in Article 109 paragraph of the Criminal Procedure Code, namely "In the event that the investigator stops the investigation because there is insufficient evidence or the incident turns out not to be a criminal act or the investigation is stopped by law, the investigator will notify the public prosecutor, the suspect or his family of this."

So, can restorative justice be called an effort that "always produces good results"? Currently, there is a growing body of literature discussing the potential, benefits, and dangers of using restorative justice in domestic violence cases, which should be handled by the criminal justice system. Furthermore, many people still hold the common view that when a problem is resolved through restorative justice, they immediately assume that the perpetrator "will not repeat" their actions. But is this assumption still relevant when the crime occurs within a marriage?

Despite the promising potential of restorative justice, and its application, which has been shown to be "successful" in some cases (such as in the decision number 56/Pid.Sus/2020/PN.Bdw), the application of restorative justice to domestic violence remains controversial. Many feminist advocates have expressed concerns about resolving domestic violence cases through restorative justice. Some feminist experts also consider the application of restorative justice to domestic violence to be a "step backward" in law enforcement, as removing the issue of domestic violence from the courts seems to trivialize its importance after years of feminists drawing public and judicial attention to it.

Based on research conducted by Afifah Kusuma Wardhani and her team from the University of Indonesia, they found that in many cases of sexual violence, victims tend to be reluctant to report the crime due to status inequality, economic dependence, and social pressure. Therefore, because of these factors, victims perceive that filing a report will actually pose a risk (in a negative connotation). This has ultimately fueled pressure for the government to recognize the urgency of changing the complaint offense to a common offense under Article 473 paragraph (6) of the National Criminal Code.

### **a. Philosophical Basis**

Essentially, the state does not specifically regulate in law whether a crime is a complaint offense or a common offense. However, in certain cases, the state limits its involvement in personal relationships, for example, within the private sphere of domestic relations. However, as time passes, societal behavior naturally evolves, so laws, as a tool for "regulating" such behavior, must also undergo some changes to remain relevant, including those related to sexual violence within marriage.

In Article 28G of the 1945 Constitution of the Republic of Indonesia (UDN NRI 1945) it is stipulated that "Everyone has the right to protection of themselves, their families, their honor, their dignity, and their property under their control, and has the right to a sense of security and protection from the threat of fear to do or not do something that is a basic human right." When linked to the main topic of this research, namely the complaint offense contained in Article 473 paragraph (6) of the National Criminal Code, it can be understood that victims, even though they are in a marriage bond, actually have the right to continue to receive personal protection and protection to do or not do something. The word "do" here can be interpreted that if the rape victim in the marriage bond has experienced very severe violence and includes violence or serious abuse, then the correct implementation of Article 28G is that the victim still has the right to receive protection from threats, even if they do not do something (in this case, doing is interpreted as making a complaint). However, the reality, as explained above, is that victims who "did nothing" still have difficulty obtaining protection from the state, because the complaint offense contained in Article 473 paragraph (6) of the National Criminal Code is considered rigid.

Furthermore, there are other constitutional rights regulated in Article 28I paragraph (4) of the 1945 Constitution of the Republic of Indonesia, which states, "The protection, advancement, enforcement, and fulfillment of human rights are the responsibility of the state, especially the government." This article can be seen as an affirmation from the government that the protection, advancement, and fulfillment of human rights are indeed the responsibility of the government. Similarly, Article 28G of the 1945 Constitution of the Republic of Indonesia, due to the contradiction between one article in the 1945 Constitution and another article in the National Criminal Code, the implementation of the government's role in protecting human rights based on Article 28I paragraph (4) cannot be reflected in real



life. The differences between these articles are considered concerning, because the law is essentially created to provide protection, benefit, and justice for all citizens. However, if the written law cannot be implemented in reality, can it still be called "law"?

### **b. Sociological Basis**

Before drafting a law, the government must have an academic paper as a guideline. The goal is to ensure that the legislation can be implemented and enforced because it aligns with the realities of society, not just written law. So what if the laws or regulations drafted by the government fail to provide solutions to legal problems that arise in society? This, according to the author, is the sociological basis for the urgency of changing the offense of complaint to a common offense in the crime of rape under Article 473 paragraph (6) of the National Criminal Code.

Sociologically, the old view that sexual relations within marriage are the wife's obligation and the husband's absolute right (marital immunity) is a patriarchal view that is no longer in line with the values of modern society that uphold gender equality and human rights. This patriarchal thinking also seems to "ignore" the importance of consent, even when engaging in sexual intercourse with a married partner. It's important to understand that when a man and a woman marry and bind themselves in the bonds of marriage, that doesn't mean both parties give their consent to always have sex, even when one party doesn't want it. Therefore, it's crucial for society to understand and acknowledge that consent is essential to every sexual relationship, even within marriage.

Furthermore, when the invitation to have sex involves violence against the victim, we can certainly view this as a serious crime, rather than simply maintaining that it remains a private matter. With the shift in public perception, even if rape involves violence within a marriage, if there is a witness (the victim or a close relative) who knows about it, that person should have the right to report the crime, and should not have to wait for a complaint from the victim. Because the law's purpose is to protect the public, it is also crucial that its implementation protects victims. However, the reality is that victims sometimes find it difficult to report sexual violence. In some cases of violence within a marriage, the wife is often in a position of economic and/or psychological dependence on the perpetrator (the husband). And because the wife is almost always dependent on her husband, she sometimes has no choice but to remain "compliant" despite the violence.

This shift from a complaint-based offense to a regular offense allows law enforcement officials to process cases independently upon receiving a report of a crime, thereby reducing the burden on victims and preventing withdrawal of complaints due to pressure or false reconciliation. Furthermore, strong demands from civil society organizations, women's activists, and public awareness are needed to eliminate impunity (exemption from punishment) for perpetrators of sexual violence. Finally, the law itself must remain responsive to developments and the legal needs felt by society, especially vulnerable groups.

Based on the foregoing, it can be said that by providing clearer regulations regarding marital rape, changing it from a complaint-based offense to a regular offense, the state sociologically affirms that marriage is not a justification that can be used as a "shield" for committing violence, and that sexual violence in any form, including by a legal partner, is a crime that must be dealt with firmly for the protection of human rights and social justice.

### **c. Legal Basis**

In general, legal basis perspectives can be divided into two: (1) a legal basis that grants authority to certain agencies/officials to create specific regulations; and (2) a basis that provides the legal basis for regulating certain matters. From a legal perspective, common legal issues include regulations that are no longer relevant to societal developments, regulations that are inconsistent with each other or even overlap, regulations that exist but are inadequate to address the realities of societal problems, or regulations that simply don't exist at all (a normative vacuum). As explained previously, Indonesia has a variety of laws and regulations governing sexual violence, both within and outside of marriage. However, in reality, these laws also have their own "regulations" regarding marital rape, which creates inequality because these regulations contradict each other.

As the main focus of this research is Article 473 paragraph (6) of the National Criminal Code which in essence regulates the crime of rape committed by a husband against his wife which can only be "actioned against" or prosecuted if the victim or wife herself reports it to law enforcement officials, the author is of the view that the inequality of various regulations, each of which has its own "enforcement", can be said to be a factor that is sufficient to be used by the government to reconsider whether Article 473 paragraph (6) of the National Criminal Code is in accordance with social norms in society, and whether its enforcement is not "impossible" to implement.

#### IV. CONCLUSION

Sexual violence that occurs within and outside of marriage falls into two distinct categories. The key distinction between the two lies in the relationship between the perpetrator and the victim (whether they are married or not). However, if sexual violence committed by a husband against his wife results in serious injury, unfortunately, there are currently no explicit regulations that define how the definition of "sexual violence within marriage" can change from a complaint offense to a common offense. Based on this research, the author concludes that to define the "limits" of violence occurring within marriage, we can use Article 89 of the Criminal Code, which states that "rendering a person unconscious or helpless is equated with using violence," and Article 90 of the Criminal Code, which defines various types of serious injury. From the various consequences arising from acts of violence in Articles 89 and 90 of the Criminal Code, we can also use Article 108 of the Criminal Procedure Code as a basis for filing a report, because in this article it is stated that everyone (anyone, meaning not limited to victims only) has the right to report if they experience, see, witness, or become a victim of a criminal act. This is also supported by the definition of a report in Article 1 Number 24 of the Criminal Procedure Code which emphasizes that a person due to rights or obligations under the law can notify authorized officials that a criminal event has occurred, is occurring, or is suspected of occurring. Therefore, the author concludes that if another party (outside the household relationship of husband and wife) knows that there has been an act of rape with violence to the point that the victim suffers serious injuries (is helpless) or even faints, then in fact that party has the right to make a report to the police.

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